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Supreme Court of the United States

October Term, 1960

No. 403

MORTON BORROW,

Petitioner,

against

FEDERAL COMMUNICATIONS COMMISSION.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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FEDERAL COMMUNICATION COMMISSION.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Morton Borrow respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled case on June 30, 1960 affirming an order of the Federal Communications Commission dated December 2, 1959 and released December 7, 1959.

Opinions Below

The opinions of the Court of Appeals are not yet officially reported, and are appended hereto as Appendix A. The opinion of the Federal Communications Commission is not reported and appears in the Joint Appendix submitted to the Court of Appeals at J. A. 75-98.

Jurisdiction

The date of the judgment of the Court of Appeals sought to be reviewed is June 30, 1960. It was entered on the same date. No application for a rehearing was made. Jurisdiction is conferred upon this Court by the Communications Act of 1934, as amended, 47 U. S. C. § 402(j) and by 28 U. S. C. § 1254.

Questions Presented

1. Whether the Federal Communications Commission has statutory authority to require that petitioner, an applicant for the renewal of his radiotelephone and radiotelegraph operator's licenses fill out a questionnaire, under oath, relating to his political beliefs, associations and activities.

2. If the Commission has such statutory authority, whether the application of the law to petitioner abridges his freedom of speech and association, in violation of the First Amendment.

Constitutional Provisions, Statutes and Regulations Involved

The constitutional provisions involved are the First Amendment and Article 1, Section 9.

The statute involved is the Communications Act of 1934, 47 U. S. C. § 151 *et seq.*, the relevant portions of which are:

> "SEC. 1. For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the 'Federal Communications Commission,' which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act."
>
> • • •

"Sec. 303. Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

• • •

(l) Have authority to prescribe the qualifications of station operators, to classify them according to the duties to be performed, to fix the forms of such licenses, and to issue them to such citizens of the United States as the Commission finds qualified, except that in issuing licenses for the operation of radio stations on aircraft the Commission may, if it finds that the public interest will be served thereby, waive the requirement of citizenship in the case of persons holding United States pilot certificates or in the case of persons holding foreign aircraft pilot certificates which are valid in the United States on the basis of reciprocal agreements entered into with foreign governments;

(m) (1) Have authority to suspend the license of any operator upon proof sufficient to satisfy the Commission that the licensee—

(A) has violated any provision of any Act, treaty, or convention binding on the United States, which the Commission is authorized to administer, or any regulation made by the Commission under any such Act, treaty, or convention; or

(B) has failed to carry out a lawful order of the master or person lawfully in charge of the ship or aircraft on which he is employed; or

(C) has willfully damaged or permitted radio apparatus or installations to be damaged; or

(D) has transmitted superfluous radio communications or signals or communications containing profane or obscene words, language, or meaning, or has knowingly transmitted—

(1) false or deceptive signals or communications, or

(2) a call signal or letter which has not been assigned by proper authority to the station he is operating; or

(E) has willfully or maliciously interfered with any other radio communications or signals; or

(F) has obtained or attempted to obtain, or has assisted another to obtain or attempt to obtain, an operator's license by fraudulent means."

Statement of the Case

The facts out of which this proceeding arises are not in dispute.

Since November 28, 1925, petitioner has held various classes of radiotelegraph and radiotelephone operator's licenses issued by the Commission and its predecessor bodies (J. A. 14, 15, 76).* His first commercial license was issued on October 17, 1927. He has held a first class radiotelegraph license continuously since November 1, 1933 and a first class radiotelephone operator's license continuously since August 7, 1936. Further, since 1937, he has engaged in occupations dependent, in varying degrees, on the holding of a license (J. A. 15, 18, 76-77).

Included in these occupations have been service during World War II with the Federal Bureau of Education, as an employee of the American Export Airlines and as a radio operator in the United States Maritime Service in the Atlantic and Pacific theatres of war (J. A. 18, 19, 77).

Petitioner is presently employed under the terms of a collective bargaining agreement which provides, in part, that he may be required to hold, as a condition of continued employment, a first class operator's license (J. A. 7, 14, 80).

Radiotelegraph and radiotelephone operator's licenses were last issued to the petitioner in March of 1953, each for a term of five years (J. A. 16, 77). In March, 1958, petitioner executed timely applications for renewal. Ten days later the Commission addressed a letter to him informing him that it required additional information before taking action with respect to these applications.

* References are to the Joint Appendix filed in the Court of Appeals.

The petitioner was requested to answer, under oath, the following questions:

> "1. Are you now or have you ever been a member of the Communist Party? If the answer is yes, give dates of membership.
>
> 2. Are you now or have you ever been a member of any organization or group which advocates or teaches the overthrow of the Government of the United States or of any political subdivision thereof, by force or violence? If the answer is yes, list the organization or group and give the dates of membership." (J. A. 24, 25)

The petitioner declined to answer the questionnaire because he felt "that the Commission does not have the legal authority to require the answers to this questionnaire as a condition for renewal of [his] license and, further, that it is an infringement of [his] constitutional rights" (J. A. 26).

A hearing was subsequently held before a Hearing Examiner designated by the Commission, such hearing being confined to the determination of (1) whether petitioner failed to answer lawful questions with respect to his qualifications to be a licensee and (2) whether, in the light of the evidence adduced under issue (1), he possessed the necessary qualifications to hold a radio operator's license (J. A. 3, 4, ff.).

The Decision and Order of the Commission held that the Commission had the authority to ask the questions and that the petitioner's application would be dismissed in the light of his refusal to answer (J. A. 75, 81, 98).

Reasons for Granting the Writ

1. This Court has frequently held that the power of an administrative agency to inquire into the political activities and associations of a citizen will not be implied from general statutory language. Especially is this true when, as in this case, there is no administrative or legislative history to justify such inquiry.

The leading case on the subject is *Kent* v. *Dulles*, 357 U. S. 116, where the Court held that the right of an administrative agency to inquire into the political activities of a citizen of the United States will be most narrowly construed and will not be implied from the general language of a regulatory statute. The constitutional right to travel involved in the *Kent* case, is no more a basic and fundamental right than the constitutional right to engage in a lawful occupation. *Allgeyer* v. *Louisiana*, 165 U. S. 578; *Meyer* v. *Nebraska*, 262 U. S. 390; *Truax* v. *Raich*, 239 U. S. 33; *Cummings* v. *Missouri*, 4 Wall (71 U. S.) 277; *Butchers Union Co.* v. *Crescent City Co.*, 111 U. S. 746; *Parker* v. *Lester*, 227 F. 2d 708 (C. A. 9, 1955).

The language of the *Kent* case, with but few modifications, might be applied to this case; the same is true of *Greene* v. *McElroy*, 360 U. S. 474, where the Court held that the industrial security program administered by the Defense Department was invalid because there was no clear authorization, either by Congress or the President, for the existence of a program which conducted inquiry into the political activity and association of industrial employees. So here, there is no authority at all for the actions of the Commission which so closely impinge on our constitutional liberties.

2. There is in the present case, as in *Kent*, an administrative practice of long standing and, furthermore, a legislative history which makes it abundantly clear that the Commission does not have the power it claims.

The right now asserted by the Commission to submit political questionnaires to applicants for licenses was first asserted in 1954; prior to that date, the Commission had repeatedly disavowed any jurisdiction over this subject matter.*

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* The Commission has had ample opportunity to exercise the power it now claims. It has issued millions of licenses since its creation; there were, at the end of the fiscal year 1958, 1,500,854 licenses and permits outstanding. Over 300,000 applications are filed in an average year.

Sections 303(l) and (m) of the Act are copied directly from the Radio Act of 1927 (44 Stat. 1164). There is no evidence that the Federal Radio Commission, the predecessor to the Federal Communications Commission, or the Department of Commerce, which originally issued licenses to radio operators, ever applied a political test to applicants or licensees or had ever manifested any interest in their political affiliations or activities.

The application forms used by the Commission since its organization have not contained any questions relating to the political activities of an applicant (J. A. 6). Except for a single instance in 1954 (*Matter of Lafferty*, 23 F. C. C. 761),* there is no evidence that the Commission had ever addressed such questions to any applicant until 1958, when the petitioner and three other applicants were asked the questions now at issue.

The petitioner testified that never before had he been asked any such question, and that neither the Department of Commerce, the Federal Radio Commission or the Federal Communications Commission, prior to 1958, had ever manifested any interest in his political activities (J. A. 19).

There is thus a significant history of the failure of the Commission to assert the authority it now claims. *Federal Trade Commission* v. *Bunte Bros. Inc.*, 312 U. S. 349, 352; *Mintz* v. *Baldwin*, 289 U. S. 346, 351; *Chapman* v. *El Paso Natural Gas Co.*, 204 F. 2d 46, 51 (C. A. D. C. 1953).

It is not only on such negative evidence that petitioner relies. Both Congress and the Commission have, in the past, been in agreement that the Commission does not have the right it now asserts.

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* The Commission first submitted a political questionnaire to Lafferty in 1954. His case was widely regarded as a test case and, indeed, the Commission had it under consideration for three years before handing down an order holding that it had the authority to question applicants concerning their political affiliation. It is our understanding that Lafferty died pending an appeal from the ruling of the Commission and hence his case became moot.

Twice in its history the Commission has considered the establishment of qualifications for a license other than technical and citizenship requirements. In 1938, a proposal to modify the rules to permit the setting of "mental" and "moral" qualifications was dropped when objection was made on grounds of lack of authority. (See FCC Docket No. 5218, pp. 241, 253, 335; J. A. 9, 10.) In 1955 a proposal was made to prohibit the issuance of radio operators' licenses to members of the Communist Party (Dockets Nos. 11060 and 11061). Again, it was argued, in opposition, that the Commission did not have the power to impose political tests on applicants or to inquire into their political affiliation. Those proceedings have been pending undetermined for over five years (FCC Docket Nos. 11060 and 11061; J. A. 6).

The relevant Congressional history is equally significant as bearing on the Commission's lack of power. In 1940 and 1941 Congressman Izak introduced bills to amend the Communications Act to give the Commission the right to refuse to issue a license to an applicant who was "subversive" and to suspend licenses of radio operators found to be "subversive". The bills (H. R. 10446, 76th Cong.; H. R. 3364, 77th Cong.) were referred to Committee and were not reported out.

In the 77th Congress, Congressman Dirksen introduced H. R. 2662, a comprehensive measure designed to establish hiring halls for merchant seamen, continuous discharge books, and other related matters. Sections 107 and 108 of the bill provided that the Commission would have the right to deny a license to any radio operators "with respect to any shipping station" if he were guilty of subversive activities.

Hearings were held on that bill beginning on February 26, 1941. Congressman Dirksen told the committee that the Federal Communications Commission had testified before the House Appropriations Committee that it had

never inquired into the desirability of license holders in any respect other than technical qualifications and that there was no provision in the law for the revocation or denial of a license for subversive activities. Congressman Dirksen explained that his bill was intended to remedy this defect, and that the Izak bill was intended for the same purpose. (Hearing on H. R. 2662, House Committee on Merchant Marine & Fisheries, 77th Congress, 1st Sess., Feb. 26, 1941, p. 10 ff.)

Like the Izak bill, the Dirksen bill was not reported out of Committee. However, Congressman Bland subsequently introduced a bill (H. R. 5074, 77th Congress) designed to treat specifically with the problem of allegedly subversive persons engaged as radio operators in the United States Merchant Marine. There is no record of hearings on the Bland bill in the House. The bill itself was limited in its scope. It was to have been effective only until July 1, 1943. It proposed to amend the Communications Act to define a "subversive individual" and further proposed to amend §§ 303(l) and (m) to prohibit the issuance of licenses for maritime service to subversive individuals and to authorize the suspension of licenses to such persons. This bill was reported favorably. Congresman Ramspeck, in discussing it on the floor of the House on July 22, 1941 said:

> "It developed that the present law does not give the Federal Communications Commission, which issues licenses to these operators, the right to make inquiry about anything except the technical qualifications of radio operators. This bill proposes to amend the Act so that they may inquire as to their character and their background.
>
> " * * * If they find an applicant is a subversive individual or that there is a reasonable probability that he is, they can deny the applicant a license." (87 Cong. Rec. 6259, July 22, 1941, 77th Cong., First Sess.)

On September 19, 1941, hearings were held before the Senate Committee on Commerce. A number of non-governmental witnesses testified, stating that the Commission at the present had no power to deny licenses to "subversives". To the same effect was testimony by Admiral Hooper of the Navy Department and Secretary Stimson of the War Department (Hearing on H. R. 5074, Senate Committee on Commerce, 77th Cong., First Sess., pp. 71 and 75).

A memorandum was submitted to the Senate Committee by the Federal Communications Commission itself. The Commission did not discuss its lack of authority to investigate subversive activities of license holders; such lack of authority was assumed. Instead, the Commission objected to the bill on the ground that it was not qualified to examine into the matter of the subversive activities of applicants, that its staff was not equipped for that purpose, that it had had no experience in that area, that it had no procedures which would make such investigations feasible, and that it preferred not to have the authority which the Act would give it. (Hearings, pp. 77-79.) See also a statement by the Maritime Commission, *ibid.* pages 79, 80.

Evidently the Senate heeded the objections of the Commission because it abandoned the Bland bill and reported, instead, a bill which gave to the Navy Department the right to screen "'subversives" employed as radio operators in the Merchant Marine. It further provided that this power should end with termination of hostilities (Public Law 351, 77th Congress). The bill was actually passed in the Senate on December 88, 1941, without significant debate.

The failure of the Commission in 1938 to permit inquiry into the very limited area of "moral qualifications" of applicant is an indication of the Commission doubts, in 1938, as to its authority to go beyond technical qualifica-

tions. The *Lafferty* case was pending before the Commission for a full year between final argument and decision—still further indication of the Commission's lack of confidence in its own position. And, as is noted above, a proposal for an amendment of the rules has been pending undecided since 1955.

3. There is also internal evidence within the Communications Act that § 303 cannot be interpreted as broadly as the Commission now contends. Section 303(m) enumerates the grounds for the revocation of a license, and well known principles of statutory construction would require that such enumeration would exclude grounds not enumerated. Since the general subject of political activities or membership in "subversive" organizations is not listed in subdivision (m), it would seem that the Commission does not have the power to revoke licenses for such reason.

It would be anomalous that the Commission would have the right to deny a license to applicant for reasons insufficient to justify revocation.

4. This Court has had frequent occasion to consider the effect upon First Amendment freedoms of belief, activity and association of the kind of inquiry undertaken by the Commission in this case. The language of the Court in *National Association for the Advancement of Colored People* v. *Alabama*, 357 U. S. 449, at 462, is an eloquent statement of the vice inherent in the kind of political inquiry which the Commission here seeks to make.

Membership in the Communist Party, like any other kind of political activity, enjoys the presumption of innocence and the protection of the First Amendment in the absence of personal activities in violation of criminal statute. *Yates* v. *United States*, 354 U. S. 298. Inquiry into such activities by a governmental agency is prohibited by

the First Amendment. *Watkins* v. *United States*, 354 U. S. 178; *Sweezy* v. *New Hampshire*, 354 U. S. 234; *Speiser* v. *Randall*, 357 U. S. 513. It is beyond the power of government officials to determine what ideas are good or bad, or what organizations are good or bad. *West Virginia Board of Education* v. *Barnett*, 319 U. S. 624; *Thomas* v. *Collins*, 323 U. S. 516. The principle of guilt by association is abhorrent to our law and mere membership in an organization cannot itself be evidence with respect to the eligibility of applicant for a license. *DeJonge* v. *Oregon*, 299 U. S. 353; *Herndon* v. *Lowry*, 301 U. S. 242.

The serious consequences upon constitutional freedoms of the sort of "disclosure" procedure followed by the Commission are well known to all and are adequately discussed by the Supreme Court in the *Watkins*, *Sweezy* and *NAACP* cases referred to above.

5. This case may reasonably be regarded as a test case of the Commission's authority. The issue has never been before this Court before, and there are a considerable number of similar cases whose disposition awaits on the decision in this case.

Since the decision here, the Commission has made a similar decision in *Matter of William C. Cronan*. Mr. Cronan has likewise appealed and his case is now pending in the Court of Appeals for the District of Columbia as No. 15,760. In addition, counsel for petitioner represents at least six other persons whose renewal applications have been held up by the Commission pending the determination of this case;* there may be still other similar pending matters.

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* *Boothroyd*, Docket No. 13536; *Jones*, Docket No. 12903; *Hauser*, Docket No. 12881; *Townsend*, Docket No. 12882; *Osband*, Docket No. 13056; and *Blumenthal*, Docket No. 12760.

CONCLUSION

For the foregoing reasons, the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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September 7, 1960.

Appendix A

(Opinion of the United States Court of Appeals for the District of Columbia Circuit)

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15473

MORTON BORROW, APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

Appeal from the Federal Communications Commission

Decided June 30, 1960

Mr. Victor Rabinowitz, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, for appellant. *Mr. Leonard B. Boudin* also entered an appearance for appellant.

Mrs. Ruth V. Reel, Counsel, Federal Communications Commission, with whom *Mr. John L. FitzGerald*, General Counsel, Federal Communications Commission, *Mr. Max D. Paglin*, Assistant General Counsel, Federal Communications Commission, and *Mr. Joel Rosenbloom*, Counsel, Federal Communications Commission, were on the brief, for appellee.

Before PRETTYMAN, Chief Judge, and WILBUR K. MILLER and WASHINGTON, Circuit Judges.

PRETTYMAN, *Chief Judge*: Appellant Borrow was an applicant for the renewal of a radio operator's license, first-class. This license would entitle him to operate trans-

mitter apparatus at radio or television stations, aboard vessels of the Merchant Marine, and at coast radio stations. He had held similar licenses, each limited to a term of years, since 1927. At the time of his latest application for renewal he was employed by the operator of two radio stations in Philadelphia. In connection with this application he was asked by the Communications Commission, as part of the requisite data, two questions which are the subject of the present controversy. They were:

> "1. Are you now or have you ever been a member of the Communist Party?
>
> "If the answer is yes, give dates of membership:
>
> "2. Are you now or have you ever been a member of any organization or group which advocates or teaches the overthrow of the Government of the United States, or of any political subdivision thereof, by force or violence?
>
> "If the answer is yes, list the organization or group and give the dates of membership:"

Borrow refused to answer either question on the ground that the Commission had no legal authority to require answers to these inquiries as a prerequisite to renewal of his license. He requested a hearing in the following language:

> "Under the circumstances I hereby request a hearing so that I may present in the appropriate form my reasons for refusal to answer the questionnaire."

Such a hearing was held, and an initial decision by the Examiner and a final decision by the Commission were rendered. The proceedings did not involve the grant or refusal of the license. They involved only the questions (1) whether the Commission had the right to ask the questions and (2) whether, if so, Borrow's refusal to answer precluded a determination that he was qualified to hold the license requested.

The Commission reaffirmed the position it had taken in a previous case[1] and, after a long discussion, concluded:

> "24. In summary, the Commission has determined that, in ascertaining whether a grant of Mr. Borrow's application would serve the public interest, it requires information as to whether or not he belongs to or has belonged to certain organizations which advocate or are reputed to advocate the overthrow of the government of the United States by force and violence. It requires such information as a prerequisite to reaching the statutorily necessary conclusion that a grant of the subject applications would serve the public convenience, interest or necessity, because of the nature of the employment available to licensees and the close relationship of such employment to the interests of national defense. * * * In the absence of the requested information, the Commission would deem it an abuse of its discretion to affirmatively conclude that a grant of Mr. Borrow's application would serve the public interest."

The Commission dismissed the application.

No procedural defects appear in the proceedings. The hearing requested was granted. The applicant was present and was represented by counsel. The full Commission later heard the matter, considered it, and decided it.

We examine the power of the Commission in respect to issuing operators' licenses. The Communications Act,[2] in Section 303, provides:

> "Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity require, shall—
>
> * * * *
>
> "(1) Have authority to prescribe the qualifications of station operators, to classify them according

[1] Travis Lafferty, 23 F.C.C. 761, 13 P & F RR 641 (1957).

[2] 48 Stat. 1064 (1934), as amended, 47 U.S.C. § 151 *et seq.* (1958).

> to the duties to be performed, to fix the forms of such licenses, and to issue them to such citizens of the United States as the Commission finds qualified, * * *."

The statute requires the Commission to make available a nation-wide radio service, *inter alia*, "for the purpose of the national defense."[3]

Thus it is clear upon the face of the statute that the Commission is empowered to prescribe the qualifications of station operators and to issue licenses only to those whom it finds qualified. It is not authorized to issue licenses except as the public interest, convenience or necessity requires—not "permits" but "requires". Pursuant to this statutory authority the Commission has prescribed that no license will be issued until the applicant has successfully passed a technical examination and "is found qualified in respect to citizenship, character, and physical condition".[4] "Character" in respect to a radio operator obviously includes reliability in the situations in which such an operator must operate.

So the problem before us is whether the questions asked were pertinent to the requirements of the public interest, etc., and to proper standards of qualification for a radio operator. This is a practical, not merely an academic, problem. It seems to us it would be difficult to imagine

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[3] Sec. 1, 47 U.S.C. § 151 (1958).

[4] 47 C.F.R. § 1.71(a). The Senate Committee on Interstate and Foreign Commerce, in reporting favorably on an amendment to the Communications Act not here relevant, added the following caveat: "Under the provisions of the Federal Communications Act of 1934, as amended, the Federal Communications Commission is required to find, with regard to every license issued by it, that the public interest will be served thereby. In making this finding, the Commission necessarily must weigh the character qualifications of persons seeking radio operator licenses. The committee desires to emphasize that this bill, as amended, does not relieve the Commission of this affirmative responsibility." S. REP. No. 2338, 85th Cong., 2d Sess. (1958).

a question more relevant or more material to the qualification of a radio operator under the statutory criteria than is the second of the two questions asked. Radio beams are the operational essence of quick modern communication and of the control of modern weapons. Not only the power to use these electronic devices but the power to interfere with waves being used by others should, it might properly seem to the Commission, be lodged in those whose loyalty to the United States is made to appear. Surely no such power should knowingly be accorded to those who belong to organizations advocating or teaching the overthrow of this government by force or violence.[5] At the very least the Commission is entitled to know whether those whom it licenses to control these devices belong to such an organization. Any program less than that simple necessity would be not only short-sighted but dangerous to the national security.

Before the Commission and before us the thrust of Borrow's argument was his complaint concerning the first of the two questions asked, *i.e.*, the question relating to membership in the Communist Party. But he refused to answer the second question also, *i.e.*, the question relating to membership in an organization which teaches or advocates the overthrow of the Government of the United States by force and violence. The Commission commented:

> "* * * at least with respect to this question, even Borrow does not argue as to the propriety of the Commission's inquiry and he presents no color of justification for his refusal to answer. On the sole basis of his refusal to answer this clearly pertinent question, and his failure even to alleged good cause

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[5] The position of radio operator with respect to our national defense was described during World War II by Mr. Fly, then Chairman of the Communications Commission, in testimony before the House Committee on Appropriations; 77th Cong., 2d Sess., on the first Supplemental National Defense Appropriation Bill for 1943, page 17 (1942). He said they are the men "who are sitting at the nerve centers of our whole military system". We think the description is equally apt today.

> for his refusal, the Commission would be required to dismiss his application."

Surely this second question could not be characterized as a mere inquiry into political affiliations. Such advocacy is a crime; indeed one of the highest order. No justification for the refusal of an applicant for a radio operator's license to answer this question is shown to us, nor can we conceive of one.

In his concurring opinion in the *Joint Anti-Fascist* case,[6] Mr. Justice Douglas wrote succinctly:

> "The problem of security is real; and the Government need not be paralyzed in handling it. The security problem, however, relates only to those sensitive areas where secrets are or may be available, where critical policies are being formulated, or where sabotage can be committed. * * * The question is one of the fitness or qualifications of an individual for a particular position."

The area involved in the case at bar is a sensitive area. Secrets of international communications are available; critical policies are formulated by the interchange of radio communications; opportunities for sabotage at critical times by false messages, by failing to shut down the station when ordered to do so, by "jamming" necessary broadcasts, are plentiful and critical. The question before the Commission, in direct, stark form, was the fitness of this applicant for a particular position, as a radio operator—not upon the merits of all relevant data but in the face of his refusal to answer questions required as part of his application.

The underlying premise of Borrow's argument, discussing almost entirely the first question put to him, is that membership in the Communist Party is merely a matter

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[6] Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U. S. 123, 181 (1951).

of political affiliation. This court has repeatedly pointed out that the President, the Congress, and the Supreme Court have declared in emphatic terms that the Communist movement is a world-wide conspiracy for power, inimical to the peace of the world and to the safety of this country. In the present state of world affairs adherence to the Communist cause is not merely a political opinion. Membership in the Party *vel non* is a proper introductory query in this area; the answer may dispose of the subject, or it may necessitate explanation which, in turn, may or may not be acceptable.

Borrow says his First Amendment rights are being infringed. We cannot agree. His right to be a licensed radio operator is not unlimited, merely because of the First Amendment. Qualifications of character, reliability and judgment apply. The public interest must be served. He desires to operate a facility which in the public interest is necessarily licensed by the Government. He has affirmative standards to meet in order to secure a license, just as do doctors, lawyers, barbers, and lenders of money. An unqualified right to pursue any chosen occupation, merely by reason of the First Amendment, is a wholly untenable proposition. As the Court observed in *American Communications Ass'n* v. *Douds*,[7] the Amendment "does not require that he be permitted to be the keeper of the arsenal."

Borrow relies upon *Graham* v. *Richmond*[8] but that case did not deal with our present problem. There the appellant had been denied a hearing although the regulations provided for one. The decision of this court, premised upon *Service* v. *Dulles*,[9] was that the regula-

[7] 339 U.S. 382, 412 (1950).

[8] 106 U.S. App. D.C. 288, 272 F.2d 547 (D.C.Cir. 1959).

[9] 354 U.S. 363 (1957).

tions must be complied with and a hearing afforded. No such problem is now at bar, as Borrow was given the hearing he requested.

The conclusions of the Commission in this matter were exhaustive, careful, well-reasoned. Its decision is

Affirmed.

WASHINGTON, *Circuit Judge, dissenting:* I do not doubt that there are strong reasons of public policy for seeking to insure that radio operators will be loyal and trustworthy at all times, and particularly in the event of a national emergency. But the same is true of a large part of our population, given the times in which we live. Railroad engineers, airline pilots, electrical system operators, reservoir inspectors, gas pipeline controllers—the list of people who can play vital roles in the functioning or nonfunctioning of our system is well-neigh endless. If these people are required to be licensed by some federal, state or local agency—and many of them are—does it follow that the licensing authority can ask them about possible Communist connections, and deny them a license (and possibly a livelihood) for failure to answer? Or for giving an unacceptable answer? Perhaps we will come to that. But if we do, it should be a legislative and not an administrative decision: a decision made after careful consideration of the needs of the national security, and of the possible consequences on the availability, mobility and self respect of our people. Decisions of that sort should be made after fullest deliberation, by those who represent the electorate—rather than by appointed officials regulating a single segment of our economy.

The Supreme Court has made it quite plain that the Government cannot act to deprive a private individual of valuable rights and privileges on security grounds unless the deprivation has been clearly and validly authorized by law. *Greene* v. *McElroy*, 360 U.S. 474 (1959);

Kent v. *Dulles*, 357 U.S. 116 (1958). Cf. *Konigsberg* v. *State Bar*, 353 U.S. 252 (1957). Here I can find no such authority.

The Communications Commission relies on the statutory provisions authorizing it in general terms to prescribe the qualifications for radio operators and to issue licenses to such citizens as it finds qualified, giving due regard to the public interest. There is no specific statutory provision empowering the Commission to inquire on security grounds into the Communist or other affiliations of an applicant for a license. Nor is there any valid basis for implying that Congress intended that the Commission have such authority.

On the contrary, Congress has refused in the past to give the Commission the authority it now claims to possess. The Izac bill in 1940,[1] the Dirksen bill in 1941,[2] and the Bland bill in the same year[3]—all would have given the Commission the power to refuse to license "subversives" as radio operators. None of these bills, with the exception of Bland, reached the floor. All, including Bland, were based on the assumption that the Commission lacked the requested authority. The Bland bill was rejected in the Senate. Congress did, however, pass a bill giving like authority to the Navy Department with respect to radio operators in the Merchant Marine. This statute has now lapsed by reason of the termination of hostilities.

One reason the Bland bill failed was that the Communications Commission itself objected to it, largely on the ground that the Commission was unprepared to make investigations into subversive activities, and did not wish to undertake them. Nothing appears which would suggest that the Commission is equipped today to pass upon

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[1] H.R. 10440, 76th Cong., 3d Sess. (1940); also introduced as H.R. 3364, 77th Cong., 1st Sess. (1941).

[2] H.R. 3962, 77th Cong., 1st Sess. at 106-107 and 108 (1941).

[3] H.R. 5074, 77th Cong., 1st Sess. (1941).

such matters. Certainly there is nothing to suggest that Congress has by implication authorized it to do so. The statutory language on which the Commission now relies is the same language that has been on the books since 1927.[4] If this language gave no authority in this field in the past, it gives none today.

In 1955 the Commission began consideration of a proposed rule which would prohibit the issuance of radio operators' licenses to members of the Communist Party.[5] Those procedings are still pending—undetermined. The Commission has adopted no regulation barring Communists or subversives. It has set no standards and fixed no procedures. Its application forms contain no mention of the matter, much less any questions about it. But of late the Commission has sent supplemental letters to certain applicants, asking the questions here complained of. This procedure is not supported by any published rule.

Compared to the flimsy framework on which the Commission rests its case, the statutory and regulatory basis on which the Secretary of State rested his claim to deny passports on security grounds in *Kent*[6] was truly monumental. Yet the Supreme Court struck down his claim, sturdily buttressed as it was. In the instant case, where a man's livelihood is involved, I think we have no alternative but to say that the Commission lacks the authority which it now asserts.

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[4] See Sections 5(C) and (D) of the Radio Act of 1927, 44 STAT. 1164.

[5] Dockets Nos. 11060 and 11061.

[6] Kent v. Dulles, 357 U.S. 116 (1958).

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No. 403

In the Supreme Court of the United States

OCTOBER TERM, 1960

MORTON BORROW, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

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BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 15-24) has not yet been reported. The decision and order of the Federal Communications Commission (J.A. 75-98) have not been officially reported, but are unofficially reported at 18 Pike & Fischer, Radio Regulation 107.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 1960. The petition for a writ of certiorari was filed on September 9, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 and 47 U.S.C. 402(j).

QUESTIONS PRESENTED

The Federal Communications Commission, preliminary to passing upon petitioner's applications for renewal of radio operator licenses, inquired of petitioner whether he was or had ever been a member of the Communist Party or of any organization advocating the violent overthrow of the United States Government. An affirmative answer to either question would not have disqualified petitioner from receiving a license; he still would have been entitled to a full hearing on his application (with right to confrontation and cross-examination) in which *scienter*, among other factors, would be relevant in determining whether a grant of license would serve the public interest. The questions presented are:

1. Whether the Commission had power to ask these questions pursuant to its authority under Section 303(l) of the Communications Act to prescribe qualifications of radio operators and to issue licenses to such United States citizens as it finds qualified.

2. Whether the First Amendment was violated by the Commission's determination that, because of petitioner's failure to answer these questions, it lacked sufficient information on which to base a finding that the grant of petitioner's application would serve the public interest.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Communications Act of 1934 (48 Stat. 1064, as amended, 47 U.S.C. 151, *et. seq.*) and of the Commission's Rules and Reg-

ulations, in addition to those set forth in the petition (pp. 2-4), are set forth in the Appendix, *infra*, pp. 22-25.

STATEMENT

Petitioner, the possessor of radio operator licenses issued by the Federal Communications Commission, is employed as a technician by a Philadelphia radio broadcasting station under the terms of a collective bargaining agreement which provides that technicians may be required to hold, as a condition to continued employment, a first class operator's license from the Commission. On March 7, 1958, petitioner applied for renewal of his first-class radiotelephone and radiotelegraph licenses (J.A. 77, 22). The Commission, pursuant to Section 1.71(a) of its Rules (47 C.F.R. 1.71(a)), and in accordance with its established policy where "it has occasion to suspect that an individual applicant might seek to utilize the privileges accorded him * * * to effectuate his 'political' views through force and violence or * * * in a manner inimical to the interests of the United States" (J.A. 85), wrote petitioner, on March 17, 1958, that it had "determined that it must have additional information before taking action with respect to your application" (J.A. 24). Specifically he was requested to answer, under oath, the following questions (J.A. 25):

1. Are you now or have you ever been a member of the Communist Party? If the answer is yes, give dates of membership:
2. Are you now or have you ever been a member of any organization or group which advocates

> or teaches the overthrow of the Government of the United States, or of any political subdivision thereof, by force or violence? If the answer is yes, list the organization or group and give the dates of membership:

The Commission's letter advised petitioner that he could submit any additional statement or information he might desire and that his failure to file the information requested would constitute grounds for the dismissal of his application (J.A. 24-25).

On April 12, 1958, petitioner wrote the Commission declining to answer because "the Commission does not have the legal authority to require the answers to this questionnaire as a condition for renewal of my license and, further, that it is an infringement of my constitutional rights" (J.A. 26). The Commission replied, on April 21, 1958, that its authority to make the inquiries stemmed from Section 303(l) of the Communications Act which empowered it not only to prescribe technical qualifications of station operators, but in addition "to consider other factors which have a reasonable relationship to the question of whether the grant of an operator license to a particular individual would serve 'public convenience, interest, or necessity'" (J.A. 27-28). The Commission referred petitioner to its decision in a similar case, *Travis Lafferty* (23 F.C.C. 761, 13 Pike & Fischer Radio Regulation 641), stating the Commission's position that such questions must be answered by applicants to whom they are addressed.

In its April 21, 1958 letter, the Commission provided petitioner a further period within which to

submit the requested information and again advised him that failure to respond to the questionnaire, or to request a hearing, would result in dismissal of his application pursuant to Section 1.71(d) of the Commission's Rules (J.A. 28-29). Petitioner again declined to answer and repeated his request for a hearing to "present in the appropriate form my reasons for refusal to answer the questionnaire" (J.A. 26; R. 1). By order of July 30, 1958, the Commission designated petitioner's application for hearing on the following issues (J.A. 76):

> (1) To determine whether Morton Borrow failed to answer lawful questions with respect to his qualifications to be a licensee which the Commission has directed him to answer under oath; (2) To determine in the light of the evidence adduced under Issue 1 whether Morton Borrow possesses the necessary qualifications to hold a radio operator license.

Following full hearing procedures, the Hearing Examiner issued an Initial Decision looking to dismissal of petitioner's application (J.A. 52-71). On December 7, 1959, the Commission, after consideration of exceptions and supporting brief (J.A. 76), released its decision dismissing the application because of its inability to determine, in the absence of the requested information, that a grant would serve the public interest (J.A. 75-98).

Reaffirming its conclusion in *Lafferty*, *supra*, that the questions as to membership in the Communist Party or in organizations advocating the violent overthrow of the Government are relevant to the qualifi-

cations of station operators under Section 303(l) of the Communications Act (J.A. 84-97), the Commission set forth its view as follows (J.A. 84-85):

> The opportunities for untoward activity available to a licensee are so obvious and so appalling as to scarcely require discussion. They range from the inconvenience and damage attendant on the sabotage of an individual station, the adverse impact of which on the national interest has been judicially recognized in [*Didriksen* v. *F.C.C.*, 103 App. D.C. 17 (254 F. 2d 354) (1958)], through the possibility of a ship's operator sending or failing to send given messages with the consequent danger to his vessel; to the very real opportunity for the technician charged with the operation of a commercial station in accordance with the CONELRAD plan to deviate from that plan and make his station a beacon for attacking aircraft or missiles. These opportunities for activities inimical to the public interest are the more insidious in that any individual act, although it might lead to the exposure of its perpetrator and the subsequent revocation of his operating privilege, could in and of itself lead to such devastation that any punitive action against the operator responsible would be totally disproportionate to the harm done. * * *.

The Commission explained (J.A. 86-87, 89, 95), that petitioner's refusal to answer the questions did not form the basis for an adverse finding as to his character qualifications, but was significant only insofar as it deprived the Commission of facts necessary for it to make the requisite statutory finding as

to whether the public interest would be served by a grant of the application.

The Commission also emphasized that its decision did not involve any determination as to whether an applicant should be denied a renewal of his licenses because of present or past membership in the Communist Party or the organizations inquired about in the questionnaire (J.A. 88). It stated (J.A. 88-89):

> Had Borrow provided the requested information, and had the Commission in the light of such information questioned whether the public interest would be served by a grant of the licenses applied for, a hearing upon appropriate issues would have been required at which evidence would have been taken, and at which Borrow would have been accorded full opportunity to present evidence and arguments appropriate to the issues.

At any such hearing, the Commission added (J.A. 86), evidence that the organizations foster or have engaged in unlawful activities, and the applicant's knowledge thereof, would be valid factors for consideration. The Commission further stated that petitioner's failure to allege good cause for refusing to answer the questions as to membership in any organization advocating the violent overthrow of the Government would in itself warrant dismissal of the application (J.A. 97).

On appeal, the court of appeals affirmed. The majority held (Pet. App. 17-21) that the questions involved are within the Commission's authority, under Section 303(l) of the Communications Act and Sec-

tion 1.71 of the Commission's Rules, and pertinent to the qualifications of radio operations in view of the sensitive position such persons occupy in relation to the national defense. The court found no procedural defect in the proceedings or infringement of petitioner's First Amendment rights (Pet. App. 17, 21). Judge Washington, dissenting (Pet. App. 22-24), was of the view that the Commission lacked statutory authority to ask the questions.

ARGUMENT

The petition here presents a limited issue as to the power of the Federal Communications Commission, preliminary to a full hearing upon an applicant's qualifications to hold a radio operator's license in the public interest, to ask him whether he is or was a member of the Communist Party or of any organization advocating overthrow of the Government by force or violence. No question is raised as to the procedures at the hearing which would have been held on the application had petitioner responded (which the Commission has stated would have included confrontation and cross-examination), or as to the substantive standards which would govern approval or disapproval of his application. Petitioner's license was denied solely because his failure to respond to the inquiry deprived the Commission of information which it considered relevant in determining whether a grant would serve the public interest. The court below correctly held that the questions were relevant to a determination of an applicant's qualifications to operate a radio station in the public in-

terest and that no violation of the guarantees of the First Amendment to the Constitution was involved.

1. Section 303(l) of the Communications Act, 47 U.S.C. 303(l), authorizes the Commission "from time to time, as public convenience, interest, or necessity requires" to "prescribe the qualifications of station operators" and to issue operator's licenses "to such citizens of the United States as the Commission finds qualified." Pursuant to this authority, and in keeping with the purposes of "national defense" and of "promoting safety of life and property" set forth in Section 1 of the Act as bases for establishing the Commission, it has prescribed that no license will be issued until an applicant has successfully passed a technical examination "and is found qualified in respect to citizenship, character, and physical condition" (Section 1.71(a) of the Commission's Rules, App. *infra*, p. 24). In furtherance of this responsibility to insure that only qualified persons are licensed, the Commission in recent years has asked the questions in issue of a number of applicants. It has pursued this course when it has had "reason to believe or suspect" that the applicant might utilize the license privileges in a manner inconsistent with the public interest (J.A. 83, 85). See Communications Act, Section 403, 47 U.S.C. 403; *United States* v. *Morton Salt Co.*, 338 U.S. 632, 642.

In view of the strategic positions occupied by Commission-licensed radio operators and the opportunities such a license affords to take action detrimental to the public (*supra*, p. 6), the questions asked of petitioner are clearly relevant to a determination of character qualifications. The first-

class radiotelephone and radiotelegraph licenses, for which petitioner applied, afford access to employment in a number of positions related to national defense and public safety; frequently such employment permits the licensee to be in sole and unsupervised control of radio equipment in his charge (J.A. 84). Moreover, the Commission's Rules make first-class radio operators responsible for the technical operation of the CONELRAD program and the instruction of others in CONELRAD procedures (see, *e.g.*, 47 C.F.R. 3.93 and 13.62).[1]

2. The question of Communist Party membership may be relevant to the "competency" or "fitness" of a teacher (*Beilan* v. *Board of Education*, 357 U.S. 399, 405; *Adler* v. *Board of Education*, 342 U.S. 485, 493; *Garner* v. *Los Angeles Board*, 341 U.S. 716, 720), or the "reliability" of a subway operator (*Lerner* v. *Casey*, 357 U.S. 468, 476). Just as a "teacher who is organizing a Communist cell in a schoolhouse or a subway conductor who is preparing

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[1] In 1951 Congress granted the President, "in the interest of national security or defense," broad authority to control electromagnetic radiations (Section 606(c) of the Communications Act; Proclamation 2914, 15 F.R. 9029). The President, in turn, has delegated to the Commission authority to "prepar[e] and [put] into effect plans * * * to minimize the use of the electromagnetic radiations of [radio] stations, in event of attack or of imminent threat thereof, as an aid to the navigation of hostile aircraft, guided missiles, and other devices capable of direct attack upon the United States" and authority to "issue appropriate rules, regulations, orders, and instructions, and to take such other action as may be necessary, to assure the timely and effective operation of the plans" (16 F.R. 12452, Secs. 1 and 4).

the transportation system for sabotage would plainly be unfit for his job" (*Beilan, supra*, at 416), so also a radio operator who is planning or instructing others in "acts of sabotage of any vital media jeopardizes highly important public interests" and is not qualified to hold a license from the Commission. *Didriksen* v. *Federal Communications Commission*, 254 F. 2d 354, 356 (C.A.D.C.). While mere membership or past membership in any of the organizations inquired into might not suffice to support a finding of disqualification, such membership is relevant to a Commission determination of qualification. Petitioner, having "blocked from the beginning any inquiry into his Communist [or other organizational] activities, however relevant to his present loyalty" (*Beilan, supra*, at 405), cannot object to the Commission's dismissal of his application; his refusal to answer its inquiries made it "impossible for the Commission to affirmatively find that a grant of such application is in the public interest" (J.A. 84). See *Lerner* v. *Casey*, 357 U.S. 468, 475-478. This is particularly true since (as in *Lerner*) the Commission had expressly informed petitioner "that continued refusal might lead to his [application's] dismissal" (*id.* at 478).

The procedures for considering petitioner's applications, had he answered the Commission's inquiries, raise no substantial question of due process and distinguish this case from *Kent* v. *Dulles*, 357 U.S. 116, and *Greene* v. *McElroy*, 360 U.S. 474, where this Court was unwilling to infer authority to institute the security program there involved from gen-

eral language delegating authority to the Secretaries of State and Defense. The Commission has not imposed a "political test" on the granting of a license or, as in *Kent* v. *Dulles*, *supra*, barred "innocent" members of the Communist Party from holding licenses. On the contrary, it has stated that membership in the Communist Party or in an organization advocating overthrow of the Government by violence was not automatically disqualifying and that the significance of any affiliation would be appraised in the light of all relevant facts after full hearing (J.A. 86, 88-89; *Lafferty*, *supra*, 23 F.C.C. at 765-766). Nor would petitioner be deprived of the traditional safeguards of confrontation and cross-examination at such hearing (J.A. 83, n. 1, R. 22; *Lafferty*, 23 F.C.C. at 770).[2] In the absence of procedures of "questionable constitutionality" (*Greene* v. *McElroy*, *supra*, 360 U.S. at 506), the express authority conferred by Section 303(l) to determine the qualifications of operators in the light of the purposes of the Act confers ample power upon the Commission to ask the questions here at issue.

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[2] In cases of this nature, the Commission requires the applicant "to refute specifically only those matters on which probative evidence was already introduced" by Commission counsel and holds the staff to the "most stringent standard of proof" (*Dispatch, Inc.*, 13 Pike & Fischer R.R. 237, 244, 280). Section 402(d) of the Communications Act, 47 U.S.C. 402(d), *infra*, p. 22, assures petitioner of a copy of the "order sought to be reviewed or enforced, the findings or report upon which it is based, and the pleadings, evidence, and proceedings before the agency" (28 U.S.C. 2112).

3. Contrary to petitioner's assertions (Pet. 5, 6-8, 10), the Commission has not failed over the years to assert its authority to ascertain character qualifications, nor has it ever disclaimed such authority. During World War II, the Commission, by rule, required biographical information, including fingerprints and photographs, from applicants for operator licenses (F.C.C. Order No. 75, 5 F.R. 2394 (1940)).[3] Subsequently, the Commission "authorized a formal inquiry into any pertinent phase of the applicant's or licensee's qualifications to hold an operator's license under wartime conditions demanding loyalty and integrity" (9 F.C.C. Annual Report 81-82 (1943)) and at the same time revised its application form to require submission of information bearing on any criminal record of convictions (including particularly conviction of specified crimes relating to loyalty), a requirement still obtaining (J.A. 22-23). While some of

[3] Even before this time, the broadly phrased operator-licensing provisions of both the Radio Act of 1912, 37 Stat. 302, 303 and the Radio Act of 1927, 44 Stat. 1162, 1170, had been administered on the assumption that character qualifications, where appropriate, could be imposed. See Hearings before the House Committee on Merchant Marine and Fisheries on H.R. 13159, 65th Cong., 3d Sess., p. 444 (concerning Department of Commerce Reg. 401); Rules of the Federal Radio Commission, as revised October 3, 1933 (pamphlet ed. GPO 1934), Section 440. The present Commission's failure to adopt a provision in a 1938 proposed rule, requiring operators to be "physically, mentally, and morally capable of performing duty" does not, as petitioner suggests (Pet. 8), show that the Commission then believed it lacked authority to adopt such a rule; the provision was deleted without explanation, and this may well have resulted from a determination that no such inquiry was then necessary.

these requirements were relaxed at the end of the war (see 11 F.R. 1218, 6685), the Commission has continued to examine character qualifications on a case-by-case basis since that time. See *John M. Moreno*, 14 F.C.C. 424 (1950); *Travis Lafferty*, 23 F.C.C. 761; *Didriksen*, 13 Pike & Fischer R.R. 425, affirmed, *Didriksen* v. *Federal Communications Commission*, *supra*. This practice was codified as Section 1.71 of the Commission's Rules in 1957 (22 F.R. 10981) (App. *infra*, pp. 24-25).

This history is not negated by Commission statements that it lacked authority to *suspend* an operator's license for any reasons other than those expressly set out in Section 303(m)(1) of the Act (see, *e.g.*, Hearings before the House Committee on Merchant Marine and Fisheries, 76th Cong., 1st Sess., on H.R. 3052, p. 2);[4] by its failure to adopt proposed rules which would have *disqualified* present members of the Communist Party;[5] or by its objections (set

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[4] Contrary to petitioner's suggestion (Pet. 11), there is no inconsistency between the existence of broad power to ascertain character qualifications in issuing or renewing licenses, and limiting suspension, during the license period, to specified acts. In fact, the very limitation on the suspension powers emphasizes the Commission's responsibility in initially determining an applicant's qualifications to operate radio equipment in the public interest.

[5] The Commission's Proposed Report and Order in this proceeding, upon which petitioner relies (Pet. 8), expressly reaffirms its authority to consider an applicant's qualifications (including loyalty factors) on a case-by-case basis. See 1 Pike & Fischer R.R., Part II, p. 63:ix, at 63:x.

forth in a 1941 memorandum to the Congress) to being *obligated* to undertake broad security functions which it believed other governmental agencies were better equipped to handle. See Hearings before a Subcommittee of the Senate Committee on Commerce on H.R. 5074, 77th Cong., 1st Sess., pp. 77-79. All of these positions are consistent with its exercise of authority to consider matters bearing on a particular applicant's loyalty or reliability in determining his basic qualifications to be a licensee.

4. The legislative history of Section 303(l) does not warrant petitioner's assertion (Pet. 8-10) that Congress has made clear its intent to preclude the Commission from ascertaining the character qualifications (including loyalty factors) of applicants for operators licenses. There is no relevant pre-enactment history with respect to the term "qualifications" as used in Section 303(l) of the Communications Act of 1934 or in its predecessor, Section 20 of the Radio Act of 1927, 44 Stat. 1170. However, the draftsmen of the original Radio Act of 1912 recognized that Section 3 of that Act (37 Stat. 302, 303), providing generally that radio apparatus shall "be in charge or under the supervision of a person or persons licensed for that purpose by the Secretary of Commerce and Labor," vested discretion in the Secretary to prescribe qualifications which "might go to his character" or "to any thing that relates to his general efficiency." (Hearings on S. 3620 and S. 5334 before a Subcommittee of the Senate Committee on Commerce, 62d Cong., 2d Sess., pp. 33-34).

The post-enactment legislative history of the Communications Act does not support petitioner's view. It is true that during consideration of several bills (in the immediate pre-war period) which would have established comprehensive security systems governing both issuance and suspension of operator licenses, Congressman Ramspeck, and perhaps Congressman Dirksen as well,[6] indicated a belief that the Commission had no right "to make inquiry about anything except the technical qualifications of radio operators" (87 Cong. Rec. 6259; see Hearings on H.R. 2662 before the House Committee on Merchant Marine and Fisheries, 77th Cong., 1st Sess., p. 10).[7] On the other

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[6] The quoted Dirksen statement, Hearings on H.R. 2662 before the House Committee on Merchant Marine and Fisheries, 77th Cong., 1st Sess., p. 10, may well have been directed to the Commission's admittedly more restricted powers of suspension.

[7] Of all of the bills referred to by petitioner (H.R. 10416, 76th Cong., 3d Sess., H.R. 2662, 77th Cong., 1st Sess., H.R. 3364, 77th Cong., 1st Sess., and H.R. 5071, 77th Cong., 1st Sess.) only H.R. 5071 was reported out of Committee. This bill, as it passed the House, directed the Commission to deny licenses to "subversive" persons and authorized suspension on such grounds. The provision seems to have stemmed, at least in part, from a contemporaneous statement by the Commission to the House Committee on Appropriations that it had never suspended operator's licenses on grounds of "subversive activities;" that aside from citizenship data—including fingerprints and biographical information—it did not then require operators to submit information bearing on such activities; and that the Commission did not have facilities to make investigations of thousands of operator licensees for "subversive activities." See Hearings before the Subcommittee of the House Committee on Appropriations on the Independent Offices Appropriation Bill for 1942, 77th Cong., 1st

hand, in a 1937 amendment to the Act broadening the suspension provisions of Section 303(m) (50 Stat. 189, 190), the Senate Committee had made clear that its bill "seeks so far as statutes may encompass this end to assure the highest type of character and qualification in the operators on ships of the United States" (S. Rep. No. 196, 75th Cong., 1st Sess., p. 4).

The most significant post-enactment expression of legislative intent in relation to the Commission's power under Section 303(l) was made at the time of amendment of that section in 1958 (72 Stat. 981). A bill (sponsored by the Commission among others) was offered to authorize the Commission to exempt from the citizenship requirements of 303(l) certain

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Sess., pp. 658-660. The Ramspeck statement, cited above, was made in connection with House debates on this bill. But after the broad loyalty check function had been placed in the hands of the Navy Department, rather than the Commission, by the Conference Committee on the bill, Congressman Bland, author of the original bill and floor manager for the conference bill, was of the view that "much of the danger in the merchant marine today from subversive radio operators is due to the fact that the Federal Communications Commission has not in the past used due diligence in cleaning out that nest of hornets" (87 Cong. Rec. 9628). The statement by Admiral Hooper, cited by petitioner, was merely that the Commission had no power to "take away or suspend their licenses" for subversive activities or character defects, and the statement by Secretary Stimson is only that the "War Department is of the opinion that the powers of the President and the Federal Communications Commission are at present inadequate to deal properly with subversive elements in the maritime radio communication field." Hearings before a Subcommittee of the Senate Committee on Commerce on H.R. 5071, 77th Cong., 1st Sess., pp. 71, 75.

holders of United States and foreign airplane pilot certificates. In the House, an amendment was inserted to require the Commission to find "that security conditions have been satisfied" before waiving the citizenship requirements. In opposing this provision, the Commission stated (S. Rep. No. 2338, 85th Cong., 2d Sess., p. 5):

> The Commission has previously interpreted public interest as encompassing authority to examine the character qualifications of persons seeking radio operators licenses and, where information is brought to our attention which might show that the issuance of such license would jeopardize the security of the United States, as authorizing this agency to refuse to issue such license. The language proposed in this bill, without the language italicized, is consistent with this view. However, the italicized language, by requiring an affirmative finding that security considerations have been satisfied, would appear to place upon the Commission a responsibility to require a complete investigation of every applicant's background preliminary to such finding.
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> * * * *
>
> The present statute requiring a license be issued only upon a finding that its issuance is in the public interest is sufficient to permit this Commission to deny license applications in those cases where security questions are involved, without requiring it to undertake the responsibility of making affirmative findings with respect to the security qualifications of each applicant which comes before it.

As a result of this presentation, Congress deleted the requirement for an affirmative security clearance. In explaining this action, the Senate Report stated (*id.*, p. 3):

> Under the provisions of the Federal Communications Act of 1934, as amended, the Federal Communications Commission is required to find, with regard to every license issued by it, that the public interest will be served thereby. *In making this finding, the Commission necessarily must weigh the character qualifications of persons seeking radio operator licenses. The committee desires to emphasize that this bill, as amended, does not relieve the Commission of this affirmative responsibility.* [Emphasis added.]

5. Petitioner's assertion (Pet. 11-12) that the First Amendment prohibits any governmental inquiry as to Communist Party membership[*] is untenable. The fact that "political affiliations" are "circumstances ordinarily irrelevant to permissible subjects of government action, does not lead to the conclusion that such circumstances are never relevant" (*American Communications Association* v. *Douds*, 339 U.S. 382,

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[*] Petitioner does not claim any constitutional bar to the inquiry as to membership in any group or organization advocating the violent overthrow of the Government. This question, the Commission pointed out, was "directed solely to unlawful activity" (J.A. 97) and therefore does not present any issue as to whether "advocacy and teaching of forcible overthrow as an abstract principle, divorced from any effort to instigate action to that end," would be a permissible subject of Commission inquiry regardless of its lawfulness under the Smith Act (18 U.S.C. 2385, *et seq.*). *Yates* v. *United States*, 354 U.S. 298, 318.

391). The aim of the Commission's inquiry is "not to penalize political beliefs" but to ascertain whether petitioner is qualified to be licensed for "positions by virtue of which [he] could, if evilly motivated, create serious danger to the public safety" and national defense (*Speiser* v. *Randall*, 357 U.S. 513, 527). See *Beilan* v. *Board of Education*, 357 U.S. 399, 405. The First Amendment "does not require that he be permitted to be the keeper of the arsenal" (*American Communications Association, supra*, 339 U.S. at 412), or relieve him of the "obligations of frankness, candor and cooperation" with respect to inquiries relevant to his qualifications for a radio operator's license (*Beilan, supra*, 357 U.S. at 405). *Federal Communications Commission* v. *WOKO, Inc.*, 329 U.S. 223, 227. Thus, even if petitioner had a right to refrain from answering the questions, the Commission was not obligated to grant the licenses in circumstances where the consequence of petitioner's failure was to disable the Commission from finding that petitioner had met the burden of establishing his qualification.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Federal Communications Commission.

OCTOBER, 1960

APPENDIX

Additional pertinent provisions of the Communications Act of 1934 (48 Stat. 1064, as amended, 47 U.S.C. 151, *et seq.*), are as follows:

Sec. 402(d). Upon the filing of any such notice of appeal the Commission shall, not later that five days after the date of service upon it, notify each person shown by the records of the Commission to be interested in said appeal of the filing and pendency of the same and shall thereafter permit any such person to inspect and make copies of said notice and statement of reasons therefor at the office of the Commission in the city of Washington. Within thirty days after the filing of an appeal, the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code.

* * * * *

INQUIRY BY COMMISSION ON ITS OWN MOTION

Sec. 403. The Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which complaint is authorized to be made, to or before the Commission by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act. The Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this Act, including the power

to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had, excepting orders for the payment of money.

* * * *

Sec. 606(c). Upon proclamation by the President that there exists war or a threat of war, or a state of public peril or disaster or other national emergency, or in order to preserve the neutrality of the United States, the President, if he deems it necessary in the interest of national security or defense, may suspend or amend, for such time as he may see fit the rules and regulations applicable to any or all stations or devices capable of emitting electromagnetic radiations within the jurisdiction of the United States as prescribed by the Commission, and may cause the closing of any station for radio communication, or any device capable of emitting electromagnetic radiations between 10 kilocycles and 100,000 megacycles, which is suitable for use as a navigational aid beyond five miles, and the removal therefrom of its apparatus and equipment, or he may authorize the use or control of any such station or device and or its apparatus and equipment, by any department of the Government under such regulations as he may prescribe upon just compensation to the owners. The authority granted to the President, under this subsection, to cause the closing of any station or device and the removal therefrom of its apparatus and equipment, or to authorize the use or control of any station or device and or its apparatus and equipment, may be exercised in the Canal Zone.

* * * *

Additional pertinent provisions of the Commission's Rules and Regulations (47 C.F.R. 1.71) are as follows:

> Sec. 1.71. *Procedure with respect to commercial radio operator license applications.* (a) Upon acceptance for filing of an application for a new commercial operator license, an examination is conducted, where required, by the field office with which the application is filed in accordance with Part 13 of this chapter. If applicant passes the examination and is found qualified in respect to citizenship, character, and physical condition, the license will be issued. Where doubts as to citizenship, character, or physical condition arise, the application is referred to the Commission's Inspection and Examination Division, Field Engineering and Monitoring Bureau, Washington, D. C., for consideration. If it appears that further information is required to determine the applicant's qualifications or that a grant of the application will not serve the public interest, the applicant will be notified in writing and given an opportunity to furnish such written showings as the Commission may request and as the applicant may desire to submit. If, from the information furnished, it does not appear that the applicant is qualified or that the public interest would be served by a grant of the application, the applicant will be advised thereof in writing and given the opportunity to request, within the period of time to be specified in such writing, that the application be set for hearing. In case of failure timely to request such hearing, the application will be denied.

(b) Where an examination is not required, the application will be handled with respect to other matters in accordance with the procedure in paragraph (a) of this section.

(c) Applications for renewal of license after acceptance for filing are handled in accordance with the procedure contained in paragraph (a) of this section, except that no examination is required unless the circumstances as set forth in § 13.28 of this chapter exist, in which case a renewal examination will be required.

(d) Failure to prosecute an application, or failure to respond to official correspondence or request for additional information, will be cause for dismissal. Such dismissal will be without prejudice where an application has not yet been designated for hearing; such dismissal may be made with prejudice after an application has been designated for hearing.

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DEC [illegible]
JAMES R. BROWNING, Clerk

Supreme Court of the United States

October Term, 1960

No. 403

MORTON BORROW,

Petitioner,

against

FEDERAL COMMUNICATIONS COMMISSION.

PETITION FOR REHEARING ON ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

VICTOR RABINOWITZ,
Attorney for Petitioner.

Supreme Court of the United States

October Term, 1960

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—o—

MORTON BORROW,

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FEDERAL COMMUNICATIONS COMMISSION.

—o—

PETITION FOR REHEARING ON ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Your petitioner, Morton Borrow, respectfully prays that this Court grant a rehearing of the order denying his petition for a writ of certiorari and that upon such rehearing the writ be granted to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on June 30, 1960.

This petition for rehearing is requested for the following reasons:

1. There is at present widespread uncertainty as to the authority of the Federal Communications Commission to apply a political test to applicants for license. This uncertainty arises from the fact that the Commission's assertion of authority would seem to be in conflict with the principles of this Court's opinions in *Kent* v. *Dulles*, 357 U. S. 116, and *Green* v. *McElroy*, 360 U. S. 474. Both of those cases held, as we understand them, that statutory authority to permit political screening must be expressly granted by Congress and will not be implied from general

language. The Court's failure to grant certiorari in this case can only prolong the existing confusion.

Since the petition herein was filed, the *Cronan* case referred to at page 12 of our petition, has been argued in the Court of Appeals for the District of Columbia. It is anticipated that, if the ruling of the Commission in that case is affirmed, Cronan will likewise make an application for certiorari to this Court. The same may be true of the half-dozen others whose cases are pending before the Commission; indeed, we are advised that there are still many other applicants for licenses who may be confronted with similar action by the Commission in the near future, once this matter is determined. In justice to them, as well as to petitioner, their rights ought to be authoritatively stated by this Court.

2. In our original petition, we pointed out that this case had been widely regarded as a test case, not only by petitioner but by the Commission as well. Shortly before the filing of the petition herein, the House Committee on Un-American Activities conducted a hearing at which a member of the Commission and counsel for the Commission testified. The minutes of those proceedings have become available in the past few weeks, and an examination of them indicates that their object was to consider a bill offered by Congressman Walter amending the Communications Act of 1934, to authorize the Commission, *inter alia*, to take the very action under consideration in this proceeding. The very introduction of the bill, of course, indicates some question in the minds of its sponsors as to the authority of the Commission to make the order in this case.

During the course of the hearing there was extensive discussion by Congressman Walter, by Commissioner Robert E. Lee and by Edgar W. Holtz, Associate General Counsel of the Commission as to the powers of the Com

mission. Thus Congressman Walter, an astute lawyer and a man with much experience in this area, asked:

> "Where is the existing law, is there express authorization for you to ask the question you did in the Borrow case? I am going to give you a curbstone opinion, and it may or may not be worth anything, but we have seen on so many occasions the Court holding that unless it is spelled out specifically, it is nonexistent, on the theory that the Government has no authority, no implied authority, to protect itself. This is a new idea, but nonetheless that is the situation."

Mr. Holtz responded "• • • This, again, is the point which will be determined at the Supreme Court level." Mr. Holtz went on to say that the testimony given by Commissioner Lee at the hearing was intended to protect the position of the Commission "in litigation when it gets to the Supreme Court." (Hearings before the House Committee on Un-American Activities, House of Representatives, 86th Congress, 2nd Session, August 23, 1960, entitled "Communist Penetration of Radio Facilities", p. 1876.)

3. The issue in this case would appear to be closely analogous to issues presented in closely related fields in which the Court has not only granted writs but has ultimately held that the action taken by the administrative agency in question was in excess of statutory authority. As is noted above, this was the precise issue in the *Kent* and *Green* cases and hence a denial of a writ in this case seems quite inconsistent with this Court's policy over the past few years.

4. Furthermore, assuming statutory authority, there are constitutional issues here which have never been passed upon by the Court and which are analogous to issues presented in cases like *Shelton* v. *Tucker* now pending before this Court as No. 14 October Term 1960. We cannot see any significant difference, constitutionally speak

ing, between a requirement that an applicant for a license list all of the organizations to which he has ever belonged and a requirement that he list merely membership in the Communist Party or in the National Association for the Advancement of Colored People. The issue here differs only in irrelevant degree from cases such as *NAACP v. Alabama*, 357 U. S. 449 and *Bates* v. *City of Little Rock*, 361 U. S. 516.

5. Since the petition has been filed in this case there has been further indication of the importance of a Court decision in this matter. As a consequence of the hearings before the House Committee on Un-American Activities mentioned above, an employee of the National Broadcasting Company who testified in that case was discharged solely because he had refused to answer questions before the Committee. The matter has been submitted to arbitration, and so far as counsel knows it is still pending. Heavy reliance has been placed by the employer on the decision of the Court of Appeals in this matter. This is cited merely as an illustration of the consequences of the denial of a writ in this case.

December 8, 1960.

VICTOR RABINOWITZ,
Attorney for Petitioner.

Certificate Pursuant to Rule 58(a)

I hereby certify that this petition for rehearing is presented in good faith and not for delay, and that the petition is restricted to the grounds specified in Rule 58.

VICTOR RABINOWITZ,
Attorney for Petitioner.